

November 9, 2012

Ms. Rebecca J. Sobie Smith & Associates 900 Ranch Road 620 South Suite C101-159 Austin, Texas 78734

Re: Brokers Prohibition Formal Opinion Request

Dear Ms. Sobie:

Thank you for your June 13, 2012 letter requesting a formal opinion relating to the Brokers Prohibition contained in §2301.006 of the Texas Occupations Code. The Board has determined that your inquiry is appropriate for the issuance of a formal opinion.

In compliance with Texas Department of Motor Vehicles (TxDMV) policy, your request was posted to the TxDMV website and the general public was provided an opportunity to review the request and to provide comments. After fully considering your inquiry and the public comments, the Board is prepared to inform you of its views on this matter.

Your request states that an undisclosed client (who holds an independent dealer license) desires to offer services including assessment, choice, and negotiation for the purchase of new automobiles. Specifically, you requested that TxDMV find that these services do not violate the Brokers Prohibition found in the Texas Occupations Code. You acknowledge that brokering is prohibited by statute but seek an opinion that your client may accompany prospective car buyers to new car dealers as a non-biased, knowledgeable resource/advocate and negotiate for a purchase price on the prospective car buyers' behalf without violating the anti-brokering provisions of the Texas Occupations Code.

The Board appreciates the interest in this matter expressed by the public and notes that several public comments were posted. Many of the comments were in support of your client being allowed to provide the services in question. However, those comments advocated the general "repeal" of the Texas Occupations Code's Brokers Prohibition. As your request observes, the prohibition is made by statute. The formal opinion process does not empower the Board to address the repeal of statutory provisions. Arguments "for" and "against" the existence of the Brokers Prohibition will not be contemplated here.

However, your request does not argue "against" the existence of the Brokers Prohibition. You contend there is a "gray area" and that your client falls within legitimate parameters. Specifically, you state your client should not be defined as a "broker" because no fee, incentive, commission, or payment would come from dealers. because prospective car buyers would compensate your client with an hourly fee, and because the fee would not be contingent or vary based on whether or not a vehicle is selected/purchased.

Unfortunately, none of these factors exempt your client from the definition of "broker" or the prohibition. The Texas Occupations Code provides:

TEX. OCC. CODE §2301.002 (3)

"Broker" means a person who, for a fee, commission, or other valuable consideration, arranges or offers to arrange a transaction involving the sale of a new motor vehicle. other than a person who is:

- (A) a franchised dealer or a bona fide employee of a franchised dealer acting for the franchised dealer:
- (B) a representative or a bona fide employee of a representative acting for the representative;

- (C) a distributor or a bona fide employee of a distributor acting for the distributor; or
- (D) the owner of the vehicle at any point in the transaction.

TEX. OCC. CODE §2301.006 BROKERS PROHIBITED. A person may not act as, offer to act as, or claim to be a broker.

Your assertion that the fee will not be paid by "dealers" does not provide an exemption. There is no distinction made in the Code for who pays the fee. If the actions constitute brokering and any fee is received from anyone, then the actions are prohibited. For example, a mother can accompany her son to a dealer and participate in negotiating the son's transaction to purchase a new motor vehicle. Assuming the mother does not charge a fee, the participation does not constitute brokering and she is not a "broker." Your client performing these services for a fee is the very definition of a "broker," there is no requirement actual or implied that payment must come from a dealer.

Your assertion that "buyers would compensate your client with an hourly fee" does not provide an exemption. There is no distinction made in the Texas Occupations Code for how the fee is determined. Charging a flat rate in all cases versus an hourly fee for brokering services does not change the fact that the provider is a "broker" and that the service is prohibited.

Your assertion that the "fee would not be contingent or vary" based on whether or not a vehicle is selected/purchased does not provide an exemption. Under the "broker" definition, a sale does not have to take place for a violation of the law to happen. The mere "offering" to arrange a transaction is considered brokering and is prohibited.

Additionally, your reliance on 43 Tex. Admin. Code §215.84 as providing parameters for your client's services is misplaced. The emphasis of this rule is to provide guidelines for advertising and marketing services. The Board does not interpret this rule to address the program outlined in your inquiry. Moreover, the rule language still specifically defines your client's contemplated role as prohibited brokering. The Board finds that activities you describe constitute "soliciting or referring buyers for new motor vehicles for a fee, commission, or other valuable consideration."

In short, while it is the goal of this Board is to encourage and facilitate business growth, the law cannot be ignored. The Texas Occupations Code's Brokers Prohibition appears to have been written to prevent the very activity contemplated by your client.

To be clear, as the holder of an independent dealer license, there is really no question that your client can offer/provide services regarding the assessment and choice of what type, color, make, and model vehicle would best suit a prospective car buyer's needs. The Board notes these are services that Texas dealers generally provide complimentary in the regular course of business, but your client could opt to charge his "used" motor vehicle customers a consultation fee for the time and effort spent engaging with them during the vehicle selection process. However, once the determination is made that the prospective car buyer requires a "new" motor vehicle, your client's services and/or compensation for those services must end.

## Therefore, it is the Board's Formal Opinion:

that your client cannot, for an hourly fee paid by the prospective car buyers, accompany prospective car buyers to new car dealers as a non-biased, knowledgeable resource/advocate and negotiate for a purchase price on the prospective car buyers' behalf without violating §2301.006 of the Texas Occupations Code.

Sincerely,

Victor Vandergriff, Board Chairman Texas Department of Motor Vehicles